1944-1951

File No. Apl- Advo General 1944-1951

Legal Depl-

C. **BRANCH**

Subject:— Appointment- and Leave of -the Advocate General, Bombay

P 13E

R. L. A'S VOL

1944 - 1951

File No. Apl- Adv General 1944-1951

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142-C

Legal Department.
File No. 5362
Sub No. C/19-6-42.
Branch

I think it is erroneous to describe the communications sent when I was about to leave Bombay during the Vacation as applications for leave. These communications were sent to inform the Department as to where I would be in case I had to be communicated with. If my recollection is correct, these communications gave my address. Moreover, I remember papers were being sent up to me where I was during 1939 and 1940. There was thus no leave applied for or granted Rule 6 in App. LI-A has therefore no application.

If however there is any other rule or some practice under which I have to bear the expense, my attention may be drawn to it.

The letter of the 18th of May 1942 which is in the file and a copy of which was sent to me by Messrs. Little and Co, is difficult to understand. This is not a matter within the purview of their duties and they seem to have acted in order to help the Department to obtain the Opinion which Counsel would not give without the intervention of Solicitors. Having acted in this manner, they made themselves liable to and paid Counsel the fees. It is obvious that they are entitled to be reimbursed by Government, whatever the position may be between the Government and the Advocate General.

Sd/- M.C. Setalvad.
Advocate General.
18.6.42.

MSR.
14/6

No. 6659
Legal Department.
Bombay Castle,
17th August 1942.

MEMORANDUM.

The undersigned presents compliments to the Accountant General, Bombay, and is directed to state that as the Advocate General (Mr. M.C. Setalwad) was away from Bombay during the summer vacation of the High Court in 1941, Sir Jamshedji Kanga had to be consulted immediately in the case of Thana Municipality for which a fee of Rs. 150/- had to be paid to him by the Solicitors to Government.

2. The Advocate General was not on leave under rule 6(a) of Appendix LI-A of the Bombay Civil Services Rules and it is therefore not possible for Government to effect recovery from him. It has therefore been decided to waive the recovery in this case and to admit the claim of the Solicitors to Government in the said matter.

By order of the Governor of Bombay,

Id/-

Secretary to Government.

To

The Accountant General, Bombay (through the Finance Department).

Copy to

The Finance Department,
The Solicitors to Government with the Bill duly countersigned.

MSR.
14/7.

Legal Department.

It happened last year that when the Advocate General was away during the vacation of the High Court Government had to consult Sir Jamshedji Kanga on a very important and urgent reference and incurred an expenditure of Rs. 150/- for the purpose. Government is of opinion that such cases should not recur.

2. Under rule 6(a) of Appendix LI-A of the Bombay Civil Services Rules Manual, the Advocate General is entitled to leave on full pay during the vacation of the High Court provided no extra expenditure is thereby caused to Government. In recent years it has been the practice for the Advocate General to leave Bombay during the vacation of the High Court without formally asking for and being granted leave under the said Rule 6(a). It would appear that this practice is not strictly in order as the Advocate General being an officer of Government cannot leave his headquarters (Bombay) without obtaining leave, and there is no provision in the Rules enabling him to do so. It is presumed that the Advocate General will have no objection formally to apply for leave whenever he leaves Bombay during the vacation as such leave will be on fully pay and will also count as duty. Under the proviso to Rule 6(a) the Advocate General will have to refund to Government the amount of any extra expense caused by reason of his absence. But such cases will be very rare. Presumably all opinion cases, excepting those demanding urgent disposal, can be sent to the

the Advocate General. And there will hardly be any Court cases during the vacation in which the appearance of the Advocate General will be imperative.

3. Allied to this question is another which has not arisen so far but is quite likely to crop up in future, namely, as to the position arising when the Advocate General goes out of Bombay during the period that the High Court is sitting e.g. to appear in the mofussil, or in another High Court or the Federal Court for a private client. If his absence is likely to be for less than 10 days at a time and 20 days in the aggregate during the whole of the calendar year, his absence can be taken as on casual leave; but if his absence is likely to be for more than 10 days at a time, it will have to be treated as extra-ordinary leave under Rule 6(d) of Appendix LI-A of the Bombay Civil Services Rules Manual read with Rule 752 of the Bombay Civil Services Rules and the question of locum tenens might have to be considered. In either case it would it seems be necessary for the Advocate General to inform Government beforehand.

4. The Advocate General is requested to offer his remarks.

Id/- P.N.M.
14/8/42

Secretary to Government.

U.R. to the Adv.General, Bombay, No. 6660 dated the 17th August 1942.

MSR.
14/6.

I agree that expenditure incurred by Government by reason of the absence of the Advocate General during the vacation or otherwise in matters in respect of which the Advocate General has to advise Government or appear for them should not fall on Government and should not be payable by the Advocate General.

2. This result should, in my view, however, be arrived at not in the manner indicated by treating the absence during the vacation or otherwise as a period of leave, but by a specific rule for the purpose.

3. It would be erroneous to regard the Advocate General as an Officer of Government having his headquarters in Bombay, who is unable to leave his Hedadquarters without obtaining leave. The Advocate General is not a whole time Officer of Government. His duties are advising Government, appearing for them, and discharging the duties mentioned in the Rules. His professional work may necessitate his occasional absence from Bombay. Indeed, he may be away from Bombay on Government work, e.g. when he is appearing for Government in the Federal Court. It would, therefore, be incorrect to regard a period of absence from Bombay as leave.

4. Further, even during the vacation, matters are referred to him for advice, and, it could hardly be said that he advises when on leave.

5. The proper course, therefore, would, in my view, be to frame a rule to cover cases mentioned in the Note of the R. L. A.

Sd/- M. C. Setlvad.
a
Advocate General.
26.8.48.

L.D.

Submitted with pp.

2. These papers relate to the amendment of sub-rule (6) of rule 11 to the Bombay Revised Law Officers (Conditions of Service) Rules, 1939.

3. The F.D. to whom the papers were ~~xxxxxx~~ referred have accepted the proposed amendment.

4. These papers may now be submitted to A(H).

Supdt.

5. Attention is invited to Dy.Secy's note on pp. 89-91 ante. In para. 4 of that note D.S. had suggested that the draft at p. 61 ante may be modified as suggested by him in ink (clean copy now put up at p.119 post) and that clause (a) of rule 6 of Appendix LI-A of the B.C.S.

6. The joint Secy., F.D., has agreed to the amendment of rule 11 of the Law Officers (Conditions of Service) Rules as proposed by D.S. as it meets the F.D's view point but he does not agree with D.S. that clause (a) of rule 6 of Appendix LI-A of the B.C.S. Rs. be deleted for the reasons given in para. 4 of his note at p. 115 ante.

7. The papers may be shown to A(H) before the draft amendment is published.

Id/- J.D.
22/6.

S.A.S. Id/- R.T.K.
23/6

A.L.R. Id/- D.S. Id/-
24/6. 24/6/44

Secy. Id/- P.N.M. A(H) Id/-
26/6/44.

NOTIFICATION.

Legal Department.
Bombay Castle, 6th July 1944.

Government of India Act, 1935.

No. 4779 .- In exercise of the powers conferred by section 55 and clause (b) of sub-section (2) of section 241 of the Government of India Act, 1935, the Governor of Bombay is pleased to amend the Bombay Law Officers (Conditions of Service) Rules, 1939, as follows, namely :-

After sub-rule (6) of rule 11 of the said rules, the following new sub-rule shall be inserted, namely :-

"(7). The Advocate General may leave the Province of Bombay for any period during the vacation of the High Court after intimating to Government the probable period of his absence and his address during the period:

Provided that except when his absence from Bombay is in connection with any work assigned to him by Government, the Advocate General shall reimburse Government in respect of the expense which Government may owing to his absence incur for employment of counsel to perform any duty assigned to the Advocate General under the Law Officers (Conditions of service) Rules."

By order of the Governor of Bombay,

P.N. MOOS,
Secretary to Government.

MSR.
14/6.

No. 8 of 1951.

Advocate General's Chambers,
High Court,
Bombay, the 26th May 1951.

U.O.R. to the Advocate General of Bombay,
No. 1702, dated the 29th of January 1951.

O p i n i o n

In my opinion, it is not necessary to issue any fresh Orders under Article 165 of the Constitution regarding the appointment of the Advocate General. It is true that in the case of High Court Judges, Article 376(1) of the Constitution specifically safeguards their salaries and allowances, and that no such provision is made either in Article 165 of 375. But any Rule, Order or other instrument which was in force under any provision of the Government of India Act, 1935, immediately before the appointed day and is re-enacted under the Constitution remains in force from the appointed day as if it were duly made by the appropriate authority under the provisions of the Constitution. This is by virtue of Article 372(2) of the Constitution and para 26 of the ~~xxxxxxxxxx~~ Adaptation of Laws Order 1950. The appointment of the Advocate General was made under the provisions of section 55(3) of the Government of India Act, 1935, which directed that he should receive such remuneration as the Governor may determine. Section ~~55~~(3) has been re-enacted as Article 165(3) of the Constitution. The Order appointing the present Advocate General and fixing his remuneration is, to my mind, an order made under a provision of the Government of India Act which has been re-enacted in the Constitution and must therefore, be treated as if it were an order made under the provision so re-enacted. It is, therefore, not necessary to make any further order. The Order

in question is not a Legislative Order.

Id/-

Advocate General.

MSR.
14/7.

Office of the R.L.A.

Statement of the Case.

1. Clause (1) of article 165 of the Constitution of India provides that the Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate General for the State. Clause (3) of that article provides that the Advocate General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

2. The present salary of Rs. 1600 plus office allowance of Rs. 500/- per month payable to the Advocate General was determined by the Governor under Government Resolution Legal Department No. 8451, dated the 26th Nov. 1946 in virtue of the provisions of section 55(3) of the Government of India Act 1935. On the coming into force of the Constitution of India no fresh orders under article 165 of the Constitution regarding the appointment of the Advocate General were considered necessary in view of the provisions of article 375. The Advocate General also agreed with this view and the Accountant General was informed accordingly.

3. The Accountant General by his letter No. GVII/H.C. 1592 dated 17th November 1950 has accepted the above view but he feels some doubt whether, in the case of Advocate General, fresh and specific sanction of the Governor would be necessary for continuing after 26th January 1950 the rate of pay sanctioned for the Advocate General under the Government of India Act, 1935. The Accountant General states that in the case of High Court Judges article 376(I) specifically safeguards the salaries, allowances of

the existing incumbents even after the 26th January 1950. While no such provision is made either in article 165 or 375.

4. Paragraph 26 of the Adaptation of Laws Order, 1950 made by the President in exercise of the powers conferred upon him by article 372(2) of the Constitution of India provides that "where any rule, order or other instrument was in force under any provision of the Government of India Act, 1935, or under any Act amending or supplementing that Act, immediately before the appointed day, and such provision is re-enacted with or without modifications in the Constitution, the said rule, order or instrument shall, so far as applicable, remain in force with the necessary modifications as from the appointed day as if it were a rule, order or instrument of the appropriate kind duly made by the appropriate authority under the said provisions of the Constitution, and may be varied or revoked accordingly. The "appointed day" has been defined in the said order to mean "the 26th day of January 1950."

5. The material provision of section 55(3) of the Government of India Act, 1935 in respect of the appointment of Advocate General is as follows:-

"The Advocate General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine."

The corresponding provision of the Constitution of India is contained in article 165(3) , which runs as follows:-

"The Advocate General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine."

It is clear that the provision of section 55(3) of the

Government of India Act, 1935, has been re-enacted in article 165(3) without any modification. The order made by the Governor under section 55(3) of the Government of India Act, 1935 in Government Resolution Legal Department No. 8451, dated the 26th November 1946, determining the remuneration of the Advocate General, can, therefore, be said to be in force by virtue of the provisions of paragraph 26 of the Adaptation of Laws Order, 1950; and no fresh order appears to be necessary under section 165(3) of the Constitution of India. It does not appear that the order in this context necessarily means a legislative order.

6. The Advocate General is requested to advise whether the above ~~it~~ view is correct.

Id/-
29/1/51.

Remembrancer of Legal Affairs.

U.R. to the Advocate General No. 1702,
dated the 29th January 1951

KSR
14/7.

No. 8862.

Legal Department,

Bombay Castle (Bombay ~~Extra~~ No.1)

6th June 1951.

To

The Accountant General,

Bombay,

Subject;- Appointment and salary of the Advocate General.

Sir,

With reference to your letter No.G VII/HC/1592, dated the 16/17th November 1950 on the above subject I am directed to state that the Advocate General, Bombay who was consulted in the matter is of the opinion that it was not necessary to issue any fresh order under article 165 of the Constitution. A copy of the said opinion together with a copy of the statement of the case is forwarded herewith for your information. I am to add, the Government of India was not consulted in the matter as it was not necessary to do so.

Yours faithfully,

Id/-

6/6.

Secretary to Government.

MSR.
14/6.

13/8

13/8